APPENDIX *

[Filed Aug. 19, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0922-CV-W-9
No. 95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

MICHAEL RUSSELL,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6), FEDERAL RULES OF CIVIL PROCEDURE

I. BACKGROUND

On June 3 and July 25, 1996, I entered orders granting summary judgment in favor of all defendants, except Michael Russell, in this case. KPERS appealed.

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* Respondents have reproduced the district court's opinion because of the numerous omissions and typographical errors in the Petitioner's Appendix.

Defendant Russell, representing himself, subsequently moved for summary judgment. On March 4, 1997, I entered an order granting Russell's motion. KPERS appealed the March 4, 1997, order. Russell did not participate in the appeal and did not file a brief in the Eighth Circuit Court of Appeals supporting his position.

On May 13, 1997, the Eighth Circuit Court of Appeals affirmed the June 3, and July 25, 1996, orders granting summary judgment to all defendants except Russell. *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679 (8th Cir. 1998) (*KPERS VI*). The Eighth Circuit Court of Appeals denied KPERS' motions for rehearing and rehearing en banc on June 12, 1997. The Eighth Circuit Court of Appeals issued its mandate on June 20, 1997.

On June 27, 1997, the Kansas Supreme Court entered an order interpreting Kansas law applicable to KPERS. *KPERS v. Reimer & Koger Assoc., Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997). Specifically, the Kansas Supreme Court disagreed with the Eighth Circuit Court of Appeals' prior rulings and held that claims by KPERS are not governed by the general two and three year statutes of limitations. *Id.*

KPERS did not file any motion in this court seeking relief based on the Kansas Supreme Court's June 27, 1997, decision.

On or about July 17, 1997, in *KPERS VI*, KPERS filed with the Eighth Circuit Court of Appeals a Motion for Leave to File Instanter a Second Petition for Rehearing Out of Time or, Alternatively, to Recall Mandate for the Purpose of Conforming Decision to Recent Controlling Decision of State Law. KPERS argued that the decision of the Kansas Supreme Court should control the statute of limitations issues in *KPERS VI*. On September 9, 1997,

the Eighth Circuit Court of Appeals denied the motion to file a second petition for rehearing or to recall the mandate. On January 12, 1998, the United States Supreme Court denied certiorari. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, —— U.S. ——, 118 S. Ct. 738 (1998).

KPERS' appeal of my order granting summary judgment to Russell was pending at the time of the Kansas Supreme Court's June 27, 1997, order. On March 30, 1998, the Eighth Circuit Court of Appeals reversed the March 4, 1997, order granting summary judgment to defendant Russell on the ground that there had been an intervening change in state law. *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) (*KPERS VII*).

The Eighth Circuit Court of Appeals in *KPERS VII* declined to follow the holding in *KPERS VI* because the Kansas Supreme Court's decision was handed down after *KPERS VI* but before the decision in *KPERS VII*. *Id.* at 751. The Eighth Circuit Court of Appeals stated that "*KPERS VI* became final" when the United States Supreme Court denied certiorari on January 12, 1998. *Id.*

On April 20, 1998, KPERS filed with the United States Supreme Court a Motion for Leave to File Petition for Rehearing Out of Time, and Petition for Rehearing. Based on the Eighth Circuit Court of Appeals' *KPERS VII* decision, KPERS asked the Supreme Court to vacate the January 12, 1998, denial of certiorari in *KPERS VI*. KPERS presented the same arguments to the Supreme Court that are presently before this court. On May 18, 1998, the Supreme Court denied KPERS' motion.

On May 21, 1998, KPERS filed in this court a Rule 60(b)(6) Motion for Relief from Judgment. Based on the Eighth Circuit Court of Appeals' decision in *KPERS VII*, KPERS seeks relief from the 1996 orders involved in *KPERS VI* granting summary judgment to all defend-

ants except Russell. *See* Reply Memorandum, pp. 6-7 ("it is not the Kansas Supreme Court's ruling alone that warrants Rule 60(b) relief in this case, it is the 8th Circuit's ruling in *KPERS VII*").

II. DISCUSSION

A. Rule 60(b) Does Not Authorize this Court to Review Appellate Court Decisions Rejecting the Basis of KPERS' Argument for Rule 60(b) Relief

Rule 60(b) does not give a court the power to revisit an issue already decided by an appellate court. *See, e.g., Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *Colorado Interstate Gas v. Natural Gas Pipeline*, 962 F.2d 1528, 1534 (10th Cir. 1992) ("district court must comply strictly with the mandate rendered by the reviewing court.").

KPERS argues that it is not asking for relief based on the Kansas Supreme Court decision but on the reasoning of the Eighth Circuit Court of Appeals in *KPERS VII*. However KPERS wraps the package, the foundation of KPERS' argument here, and in *KPERS VII* and in its July 17, 1997, Motion for Leave to File a Second Petition for Rehearing in *KPERS VI*, is that the decision of the Kansas Supreme Court, not the decision of the Eighth Circuit Court of Appeals, establishes the applicable statute of limitations. When presented with KPERS' argument, the Eighth Circuit Court of Appeals refused to grant a rehearing or to recall its mandate in *KPERS VI*. Thereafter, when presented with the same argument, the United States Supreme Court denied certiorari.

Under these circumstances, Rule 60(b) does not authorize this court to grant relief from the final judgment in *KPERS VI*.

B. KPERS Is Not Entitled to Relief Under Rule 60(b)

Even if one accepts KPERS' argument that it has not already presented to appellate courts the argument made here, KPERS is not entitled to relief under Rule 60(b). The reasoning of the Eighth Circuit Court of Appeals in *KPERS VII* cannot possibly produce the same result in *KPERS VI* because the procedural facts in *KPERS VI* are crucially different from the procedural facts in *KPERS VII*. *KPERS VI* was finally decided by the Eighth Circuit Court of Appeals *before* the Kansas Supreme Court decision. The crucial factual difference that led the Eighth Circuit Court of Appeals to reach a result in *KPERS VII* that was different from the result in *KPERS VI* was that the Eighth Circuit Court of Appeals decided *KPERS VII* *after* the Kansas Supreme Court decision was issued. Therefore, applying the reasoning of *KPERS VII* to the facts in *KPERS VI* would produce a different result in *KPERS VI* than was reached in *KPERS VII*.

Furthermore, Rule 60(b) provides for relief "only where the movant has shown exceptional circumstances." *Hepper v. Adams County*, 133 F.3d 1094, 1096 (8th Cir. 1998). For the reasons stated at ¶ 4-9 of defendant KMPG Peat Marwick and Robert W.L. Spence's Memorandum of Law, a change in or clarification of state law after a final decision in federal court is not an exceptional circumstance allowing the extraordinary relief of reopening the final *KPERS VI* judgment. Therefore, plaintiff has not satisfied its burden under Rule 60(b)(6).

III. CONCLUSION

Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the Eighth Circuit Court of Appeals—this case is over. To the extent, if at all, that equitable considera-

tions have an effect on Rule 60(b) relief, KPERS long ago abandoned any persuasive claim to equity. *See In re KPERS*, 85 F.3d 1353, 1359-60 (8th Cir. 1996); *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1066 (8th Cir.), 117 S. Ct. 345 (1994).

Because this court is without power to grant relief when higher courts have refused to grant relief when presented with the very reasons advanced here and because plaintiff has not demonstrated exceptional circumstances justifying extraordinary relief, KPERS' Rule 60(b)(6) motion will be denied.

Accordingly, it is ORDERED that KPERS' Rule 60 (b)(6) Motion for Relief from Judgment is denied.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
United States District Judge

Kansas City, Missouri
August 19, 1998.